

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENDA RODRIGUES-OSTLAND,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 267941

Kalamazoo Circuit Court

LC No. 04-000913-FH

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of larceny in a building, MCL 750.360. We affirm defendant's conviction and sentence, but remand for correction of the order of restitution.

Defendant first argues that the trial court abused its discretion when it denied her request for a mistrial premised on the fact that MRE 404(b) evidence, previously ruled inadmissible, was presented to the jury through a police detective's testimony. See *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). We disagree.

Mistrials should only be granted when there is an irregularity that is prejudicial to the rights of the defendant and impairs her ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). Prejudice is shown when the trial court's ruling is so grossly in error that it deprives the defendant of a fair trial or amounts to a miscarriage of justice. *Wells*, *supra*.

Here, before trial defendant moved in limine to prohibit the admission of evidence that tended to show that the victim's checking account was improperly used to pay some of defendant's bills. The motion was granted. However, during the trial, the detective who investigated this matter was asked at the beginning of her testimony about her initial contact with defendant. The detective responded that she first made contact with defendant because she wanted to speak to her about some checks that defendant's name "came up on" that were written on the victim's account.

Defense counsel immediately objected and the court instructed the jury to disregard the testimony "other than to place into context" that the detective spoke with defendant during the investigation and the reason why is not part of the trial. Shortly thereafter, defendant moved for

a mistrial on the ground that the introduction of this prohibited information regarding the checks irreparably damaged the proceeding. The trial court disagreed, as do we. That defendant was contacted because of some checks her name “came up on” is too ambiguous of a statement to have prejudiced defendant’s rights and did not impair her ability to a fair trial. Considered in context, the remark was brief and does not reasonably lead to a conclusion that defendant engaged in fraudulent transactions involving the victim’s checking account.

Further, a witness’ volunteered answer that injects improper evidence into a trial is not a sufficient basis for granting a mistrial, unless the prosecutor knew in advance that the witness would give the prohibited testimony, or the prosecutor conspired with the witness to introduce the prohibited testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no evidence of that occurring in this case. And, while police officers have a special obligation to avoid introducing prohibited testimony, again, the testimony was brief, ambiguous, and it does not appear to have resulted from a studied purpose to interject inadmissible evidence. See *id.* Thus, the trial court did not abuse its discretion when it denied defendant’s motion for a mistrial. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Next, defendant argues that prosecutorial misconduct deprived her of a fair trial. After review de novo, we disagree. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The purported misconduct to which defendant complains occurred during the prosecution’s cross-examination of defendant’s codefendant, her sister Georgia Vrael. Specifically, the prosecution questioned Vrael as to whether she paid some of defendant’s bills using checks drawn on the victim’s account. Defendant claims that the motion in limine ruling prevented this questioning. We disagree.

Defendant moved in limine to prevent reference to the fact that defendant was originally charged with a second count, that of forging, altering, or counterfeiting a financial transaction device, MCL 750.157r, for which she was not bound over. The charge arose from allegations that checks drawn from the victim’s account were improperly used to pay some of defendant’s bills. The court ruled that such evidence was not admissible, at least for purposes of the case-in-chief against defendant. During defendant’s rebuttal case, codefendant Vrael testified. On cross-examination, the prosecutor questioned Vrael about her access to the victim’s checking account and her use of the checking account to pay off some of defendant’s bills. Defendant objected and the court overruled the objection on the ground that it was relevant to the witness’ credibility. We agree with the trial court’s ruling. And, contrary to defendant’s argument on appeal, the ruling plainly did not contradict the in limine ruling. Thus, the asserted claim of prosecutorial misconduct is without merit and defendant was not denied a fair trial on that ground.

Defendant also argues that the trial court’s scoring of her sentence based upon facts not found by a jury violated her Sixth Amendment right to a jury trial. This claim has been rejected by our Supreme Court and, thus, it is without merit. See *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant finally argues that the trial court erred when it ordered defendant to pay “\$4,350.40 and such other amounts as the Court determines due and payable.” The court ordered that this amount, \$4,350.40, be paid to the funeral home and to the State of Michigan as reimbursement for providing the victim’s funeral subsequent to her death. The court noted that

because of defendant and her codefendant's actions, the victim was left destitute—there were no funds in which to pay these final expenses. Defendant claims on appeal that this order is illegal, pursuant to MCL 780.66, because the funeral home and State “wrote off” these costs. It is unclear, but it appears that defendant is arguing that they were not victims of her crime. We agree, but only in part. Because defendant failed to object to the restitution amount at sentencing, our review is for plain error affecting her substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Crime Victim's Rights Act, MCL 780.751 *et seq.*, controls whether a sentencing court's restitution order is appropriate. *People v Crigler*, 244 Mich App 420, 423; 625 NW2d 424 (2001). “Victim” is defined by the statute as an “individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.” MCL 780.766(1). The definition of “victim” also includes, for some purposes, a “sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime.” MCL 780.766(1).

Here, the victim's death was completely unrelated to the crime. Clearly neither the funeral home nor the State of Michigan suffered direct financial harm as a result of defendant's crime against the victim. Therefore, defendant was not liable to the funeral home or the State for the victim's funeral expenses. See MCL 780.766(5). The prosecutor's argument that defendant caused the victim's poverty only establishes an indirect relationship to the purported financial harm suffered by the State and funeral home which is insufficient. Nonetheless, defendant is directly responsible for the loss of the victim's property. Therefore, restitution is authorized and should be made payable to the victim's estate. MCL 780.766(2), (7). The estate may then answer any claims made on behalf of the funeral home and State of Michigan. Therefore, we vacate the order of restitution as to its requirement that payment be made to the funeral home and State; the amount of restitution for the value of the victim's property may be more or less than the court originally ordered as computed on remand under MCL 780.766(3)(b).

Defendant also challenges the indeterminate nature of the restitution order, i.e., that it may order “such other amounts as the Court determines due and payable.” However, because we are remanding the matter of restitution to the trial court for proper calculation, we need not address this issue but instead order the trial court to determine a sum certain with regard to the payment of restitution to the victim's estate.

We affirm defendant's conviction, but remand the matter of the amount of restitution defendant must pay to the victim's estate for calculation. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen